

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 91-631-T - ORDER NO. 92-351 ✓
MAY 20, 1992

IN RE: Application of Underwood Hauling,)
 Inc., 1905 Elrod Road, P.O. Box) ORDER
 743, Piedmont, SC 29673, for a) GRANTING
 Class E Certificate of Public) APPLICATION
 Convenience and Necessity.)

This matter is before the Public Service Commission of South Carolina (the Commission) on the November 15, 1991 Application of Underwood Hauling, Inc. (Underwood or the Applicant) for a Class E Certificate of Public Convenience and Necessity¹ authorizing it to transport property as follows:

LIQUIDS, IN BULK; AND DUMP TRUCK COMMODITIES, AS DEFINED
IN R.103-211(13): BETWEEN POINTS AND PLACES IN SOUTH
CAROLINA.

This Application was filed pursuant to S.C. Code Ann. §58-23-40 (1976).

Subsequent to the initiation of this proceeding, the Executive Director of the Commission instructed the Applicant to cause to be published a prepared Notice of Filing in certain newspapers of general circulation in the State of South Carolina. The Notice of Filing indicated the nature of the Application and advised all

1. "A class E motor carrier is a common carrier of property by motor vehicle which does not operate upon any particular route or particular schedule and which is commonly known as an irregular route common carrier." 26 S.C. Regs. 103-114(1976).

interested parties desiring to participate in the proceeding of the manner and time in which to file the appropriate pleadings. The Notice of Filing was duly published in accordance with the instructions of the Executive Director. Petitions to Intervene were filed by J.E.D. Transport, Inc., Associated Petroleum Carriers, Belue Trucking Company, Inc., Petroleum Transport Company, Inc., Infinger Transportation Company, Inc., Fleet Transport Company, Inc., Moore Oil Company, Inc., Eagle Transport Corporation, Kenan Transport Company, and Southern Bulk Haulers, Inc.²

A hearing was held at the Offices of the Commission on April 23, 1992. The Honorable Marjorie Amos-Frazier presided. The Applicant was represented by Clinch H. Belser, Esquire; the Intervenor was represented by Thomas M. Boulware, Esquire; and the Commission Staff was represented by Gayle B. Nichols, Staff Counsel.

After a full consideration of the testimony presented and the applicable law, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. South Carolina Code Ann. §58-23-330 (1991 Supp.) provides as follows:

[A]n applicant applying for a certificate . . . to operate as a motor vehicle common carrier may be approved upon showing . . . that the applicant is fit,

2. These parties will be referred to collectively as the Intervenor.

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willing, and able to perform appropriately the proposed service. If an intervenor shows or if the [C]ommission determines that the public convenience and necessity is being served already, the [C]ommission may deny the application.

2. 26 S.C. Regs. 103-134(1)(A)(1)(Supp. 1991) provides, in relevant part, that the Commission use the following criteria to determine whether an applicant is fit, willing, and able to provide the requested service:

- (a) FIT The applicant must demonstrate or the Commission determine that the Applicant's safety rating is satisfactory. This can be obtained from U.S.D.O.T., SCDHPT, and PSC safety records. Applicants should also certify that there are no outstanding judgments pending against such applicant. The applicant should further certify that he is familiar with all statutes and regulations, including safety regulations, governing for-hire motor carrier operations in South Carolina and agrees to operate in compliance with these statutes and regulations.
- (b) ABLE The applicant should demonstrate that he has either purchased, leased, or otherwise arranged for obtaining necessary equipment to provide the service for which he is applying. The Applicant should also provide evidence in the form of insurance policies or insurance quotes, indicating that he is aware of the Commission's insurance requirements and the cost associated therewith.
- (c) WILLING Having met the requirements as to 'fit and able', the submitting of the application for operating authority would be sufficient demonstration of the applicant's willingness to provide the authority sought.

3. "The doctrine of [public] convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity requires a given service

to be performed or dispensed with." State v. Carolina Coach Company, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963).

4. "'Necessity' means reasonably necessary and not absolutely imperative." Id. citing State v. Southern Railway Co., 254 N.C. 73, 79, 118 S.E.2d 21, 25 (1961). ". . . It is necessary if it appears reasonably requisite, is suited to and tends to promote the accommodation of the public." Id.

5. "In the phrase 'public convenience and necessity' the word 'necessity' means that which is needful, essential, requisite or conducive to 'public convenience'. When more convenient and adequate service is offered to the public, it would seem that necessity requires such public convenience should be served." Atlantic Greyhound Corporation v. Commonwealth of Virginia, 196 Va. 183, 193, 83 S.E.2d 379, 384 (1954).

6. The South Carolina Supreme Court has held that while an intervenor's testimony that its business will be adversely affected by the increased competition produced by an increased number of motor carriers is relevant, such testimony "is not determinative and 'should not in itself defeat an application for additional services'." Welch Moving and Storage Co. v. Public Service Commission, 301 S.C. 259, 391 S.E.2d 556, 557 (1990), citing Greyhound Lines, Inc. v. South Carolina Public Service Commission, 274 S.C. 161, 166, 262 S.E.2d 18, 21 (1980).

7. Underwood's November 15, 1991 Application indicates that the Applicant is a South Carolina corporation with its principal areas of operation in Oconee and Greenville Counties. The

Application further indicates that Underwood has no outstanding judgments, that Underwood is familiar with all statutes and regulations governing for-hire motor carrier operations in South Carolina and agrees to comply with these statutes and regulations, and that Underwood is aware of the Commission's insurance requirements and the associated insurance premium costs. Underwood attached a quote of its current liability and cargo insurance policies to its Application. In addition, Underwood attached financial exhibits to its Application which indicate the Applicant is financially stable. Attachments to the Application further reveal that Underwood has a net worth of approximately \$53,000.

8. Nancy Underwood, sole shareholder, President, and Secretary/Treasurer of Underwood, testified that the Applicant was incorporated in October 1990 and that in August 1991 it began operation under a lease agreement with Thrift Brothers, Inc. (Thrift). Ms. Underwood testified that under this agreement, Underwood leases a Mack tractor to Thrift for \$300 "per load, plus." Ms. Underwood explained that Thrift pays Underwood a minimum of \$300 per load or the cost indicated on Underwood's invoice. According to Article V of the lease agreement, Underwood is responsible for maintaining the insurance on the tractor. Hearing Exhibit 1. Ms. Underwood testified, however, that the insurance on the tractor was jointly maintained by Underwood and Thrift. Ms. Underwood testified that while Underwood provided the driver for the tractor, the driver was under Thrift's control and at Thrift's disposal. Ms. Underwood explained that a placard

identifying Thrift was placed on the tractor.³

9. Ms. Underwood testified that the Applicant was requesting Class E certification so that it could serve all of South Carolina. Ms. Underwood explained, however, that Underwood was located closer than other carriers to several shippers who could use its service for liquid asphalt and dump truck commodity shipping. Ms. Underwood testified that shippers had indicated a favorable response to Underwood's Application.

10. Ms. Underwood testified that Underwood would be able to continue to use Thrift's tanker if the Commission granted its Application. She stated that Underwood did not currently own any dump truck equipment but that it would finance the purchase of such equipment if granted authority. Ms. Underwood testified that she did not anticipate that Underwood would have as large a business as those operated by the Intervenor.

11. Ms. Underwood testified that Underwood has been hauling liquid asphalt for Thrift. She testified that Underwood has served Thrift's needs and that it always had an immediate response to Thrift's requests for a carrier.

12. Jeffrey Underwood testified he was a full-time employee of Underwood in charge of maintenance and customer relations. He testified he possessed a Commercial Driver's License with endorsements for tankers and hazardous materials and that he had driven the tractor-tanker on each occasion for Thrift. Mr.

3. Ms. Underwood also testified that Underwood leases a Fruehauf tanker from Thrift.

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Underwood testified that he had observed other asphalt carriers at the Thrift plant and found their service poor. Mr. Underwood testified that if Underwood were granted authority, he would ensure that all new drivers were properly trained. On cross-examination, Underwood stated that he was not surprised that the Commission's Safety Inspectors had given Underwood a highly favorable safety review which resulted in a satisfactory rating.

13. Gary Thrift, Manager of the Asphalt Division of Thrift, testified that Underwood's quality of service has been very good. He explained Underwood was located closer to his business than other carriers, that Underwood was the quickest carrier to respond to a shipping request, and that Underwood provided better service than other carriers Thrift had used in the past. Thrift testified that his company had a workload for the foreseeable future and that it would continue to use Underwood if it was granted authority. Thrift further testified that from time to time his business had the need to haul aggregates, sand, gravel, rock, and dirt and that it would like to use Underwood for these hauls.

14. O'Neal Sanders, President of Associated Petroleum Carriers, testified on behalf of the Intervenors. Mr. Sanders testified that Associated Petroleum Carriers held authority to transport petroleum and petroleum products and that, if granted authority, Underwood's certification would directly conflict with its authority. Mr. Sanders explained that his Company's intrastate utilization of its asphalt tankers was down 40% between 1990 and 1991. He testified that the petroleum hauling market was

competitive and that public need was currently being met by the existing motor carriers. Sanders stated that Associated Petroleum Carriers had been in business for 30 years and that its current annual revenues were more than \$20 million.

15. Perry Belue, owner of Belue Trucking, Inc., also testified on behalf of the Intervenor. Mr. Belue stated that Belue Trucking, Inc. held general commodities authority and that it had been in business for 25 years. Mr. Belue testified that newcomers in the industry have depressed the hauling market. Mr. Belue explained he was opposing Underwood's Application in order to protect his company from further competition. He admitted that, at times, his company was unable to respond to the immediate demands of a shipper.

16. Arden Lemon, President of Southern Bulk Haulers, Inc., testified on behalf of the Intervenor. Mr. Lemon testified that his company held authority to transport commodities in bulk. He testified that Southern Bulk Haulers, Inc. was concerned with the additional competition that would be produced by approval of Underwood's Application.

17. Richard Infinger, President of Infinger Transportation Company, Inc., also testified on behalf of the Intervenor. Mr. Infinger testified his company held authority to transport bulk chemicals and bulk petroleum products. He explained that if Underwood were granted authority, Infinger Transportation Company, Inc. would not receive shipments that it would have otherwise received.

18. At the conclusion of the hearing, the Intervenors moved that the Commission address the leasing agreement between Underwood and Thrift. The Intervenors contended that, under the terms of the arrangement, Underwood was effectively operating as if it were a certificated carrier without obtaining a Certificate of Public Convenience and Necessity from the Commission.

CONCLUSIONS OF LAW

1. Underwood has demonstrated that it is fit, willing, and able to provide Class E liquids in bulk and dump truck commodity service to points in South Carolina. Specifically, Underwood has established that there are no outstanding judgments against it, that it is familiar with and has a thorough understanding of all statutes and regulations governing for-hire motor carrier operations in South Carolina, and that it agrees to operate in compliance with these statutes and regulations. Additionally, Underwood has demonstrated that it will obtain the equipment that is necessary to provide the Class E authority it seeks and has provided evidence of insurance which meets the Commission's requirements. Finally, Underwood has demonstrated that it has a favorable safety rating from the Public Service Commission. The Commission interprets the submission of its Application as Underwood's demonstration of its willingness to provide Class E service.

2. Based on the testimony of Underwood's witnesses, the Commission finds that public convenience and necessity require that Underwood's Application be approved. The record indicates that

Underwood is located in close proximity to potential shippers of liquid asphalt and dump truck commodities and, accordingly, the Commission concludes that the close proximity would be convenient to the shippers. Further, the witness from Thrift testified that Underwood was quick to respond to its request and, in fact, provided better service than other carriers it had used in the past.

3. Additionally, although the Commission understands the Intervenor's concern that Underwood's entrance into the market will harm their business, the Commission is not convinced that the harm, if any, will have as significant an impact as alleged by the Intervenor. Further, the Commission concludes that an increase in competition in and of itself is insufficient to defeat Underwood's Application in light of the abundant evidence that Underwood's service will provide an advantage to the intrastate market.

4. Finally, the Commission concludes that Underwood's lease agreement with Thrift does not meet the terms of the Commission's "single-source lease" exception to economic regulations. According to 26 S.C. Regs. 103-120(7)(Supp. 1991), in order to be exempt from economic regulation the lessee must maintain insurance coverage on the leased equipment.⁴

Under the terms of the parties' written lease agreement,

4. Although there are additional requirements regarding the terms of the lease and operation of the uncertificated motor vehicle carrier, the provision regarding insurance is of particular relevance to the Commission under the facts and circumstances of this case.

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Underwood, the lessor, is responsible for securing appropriate insurance on the leased vehicle. Although the lease agreement states that both Underwood and Thrift shall be named insureds on the insurance contract, the Commission concludes that this notation in the insurance policy does not in any way require Thrift, the lessee, to maintain insurance on the leased equipment as required by 26 S.C. Regs. 103-120(7). Accordingly, the Commission concludes that the arrangement between Underwood and Thrift does not meet the requirements of the "single-source lease" exception and, therefore, operating under this arrangement, Underwood was required to obtain a Certificate of Public Convenience and Necessity.

IT IS THEREFORE ORDERED:

1. Underwood's Application for Class E authority to transport liquid asphalt and dump truck commodities between points and places in South Carolina is hereby approved.
2. Underwood shall file the proper license fees and other information required by S.C. Code Ann. §58-23-10 to -1830 (1976, as amended) and by 26 S.C. Regs. 103-100 to -272 (1976, as amended), within sixty (60) days of the date of this Order, or within such additional time as may be authorized by the Commission.
3. Upon compliance with S.C. Code Ann. §58-23-10 to -1830 (1976, as amended), and the applicable provisions of 26 S.C. Regs. 103-100 to -272 (1976, as amended), a certificate shall be issued to Underwood authorizing the motor carrier services granted herein.
4. Prior to compliance with the above-noted requirements and

receipt of a certificate, the motor carrier services authorized herein may not be provided.

5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:


Deputy Executive Director

(SEAL)